No. 89-1223

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

INDEPENDENT U.S. TANKER OWNERS COMMITTEE, ET AL., PETITIONERS

v.

SAMUEL K. SKINNER, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 505 of the Supplemental Appropriations Act of 1987, Pub. L. No. 100-71, 101 Stat. 471, prohibited the Secretary of Transportation from applying the June 1987 maritime construction subsidy repayment rule to allow four oil tankers to participate in the domestic oil trade.

2. Whether the court of appeals properly determined that the Secretary of Transportation did not exceed his authority under the Merchant Marine Act, 1936, 46 U.S.C. 1101 *et seq.*, in promulgating the June 1987 maritime construction subsidy repayment rule.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 884 F.2d 587. The decision of the district court (Pet. App. 25a-46a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1989. Petitions for rehearing were denied on November 2, 1989. Pet. App. 22a. The peti-

tion for a writ of certiorari was filed on January 31, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. As this Court has noted, "[t]he costs of constructing ships in American shipyards and manning them with American crews are higher than comparable costs in foreign ports. Accordingly, Congress has taken a number of steps to protect and support the United States' shipping and shipbuilding industries." *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 574 (1980). In the Merchant Marine Act of 1936, 46 U.S.C. 1101 *et seq.*, Congress "established a number of programs to help American vessels compete effectively in foreign trade with vessels constructed and staffed abroad." *Seatrain Shipbuilding Corp.*, 444 U.S. at 575. One such program authorizes the Secretary of Transportation to subsidize construction costs for ships built in American shipyards;[1] the subsidy is known as a "construction-differential subsidy" (CDS). In order to receive a CDS, the owner of a vessel must agree to operate the vessel "exclusively in foreign trade, or on a round-the-world voyage * * *." 46 U.S.C. 1156.[2]

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[1] The Maritime Administration (MarAd) oversees the merchant marine. See 49 C.F.R. 1.4(j)(1). MarAd was originally located within the Department of Commerce. In 1981, Congress transferred the agency to the Department of Transportation, and thus the Secretary of Transportation currently exercises jurisdiction over shipping matters. See 46 U.S.C. 1601; Pet. App. 4a-5a.

[2] That condition is subject to limited exceptions. For example, a CDS-built ship may sail in the domestic trade on the first or last leg of certain overseas voyages. See 46 U.S.C.

The Act authorizes the Secretary, in his discretion, to evaluate, approve, or reject CDS applications and contracts. See, *e.g.*, 46 U.S.C. 1154. And the Act generally empowers the Secretary to "enter into such contracts, upon behalf of the United States, * * * as may, in * * * his discretion, be necessary to carry on the activities authorized by this chapter, or to protect, preserve, or improve the collateral held by the * * * Secretary to secure indebtedness * * *." 46 U.S.C. 1117.

2. a. Beginning in the mid-1970s, MarAd, reacting to the changing conditions in the world's oil market, sought to enable certain CDS-built vessels—very large crude oil carriers (VLCCs)—to participate in the domestic oil trade, principally "carry[ing] Alaskan oil to Panama where it is transshipped to Atlantic and Gulf Coast ports." Pet. App. 4a. In the late 1970s, the Secretary approved, on a case-by-case basis, contracts that permitted CDS-built vessels to enter the domestic trade once the CDS subsidies they had previously received had been repaid in full. In *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, *supra*, this Court held that the Merchant Marine Act "empowers the Secretary to approve [such] full-repayment/permanent-release transactions." 444 U.S. at 597.

b. In that decision's wake, the Secretary published and made immediately effective on October 15, 1980, an interim rule that limited the full CDS repayment option to certain types of large vessels. The rule fur-

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1156. The Secretary may also permit a CDS-built ship to "operate domestically for a maximum of six months per year provided that the vessel repays a *pro rata* share of the subsidy." Pet. App. 3a; see 46 U.S.C. 1156. In order to invoke that exception, the Secretary must determine that the transfer to the domestic trade "is necessary or appropriate to carry out the purposes [of the Act]." 46 U.S.C. 1156.

ther provided that the Secretary "would only accept repayment in 'exceptional circumstances' after a determination that the vessels had little prospect for viable employment in foreign trade over an extended period." Pet. App. 4a-5a (quoting 45 Fed. Reg. 68,393, 68,394 (1980)). About one month later, the Secretary approved repayment and return to domestic service for the VLCC *Bay Ridge*. After it repaid its subsidy, the *Bay Ridge* began operating domestically. Pet. App. 5a.

c. In the meantime, petitioners, the Independent U.S. Tanker Owners Committee and several domestic shipping firms, challenged the Secretary's action under the interim rule.[3] In *Independent U.S. Tanker Owners Comm.* v. *Lewis*, 690 F.2d 908, 918-920 (D.C. Cir. 1982) (*ITOC I*), the court of appeals acknowledged that the Secretary had statutory authority to promulgate a CDS repayment rule, but held that he had not provided an adequate "general statement of [the rule's] basis and purpose" as required by the Administrative Procedure Act, 5 U.S.C. 553(c). The court therefore vacated the Secretary's interim rule and remanded for further proceedings; the court nevertheless permitted the *Bay Ridge* to continue operating domestically pending the outcome of those proceedings. 690 F.2d at 931.

3. a. In May 1985, the Secretary published his final CDS repayment rule permitting any U.S. flag tanker

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[3] As the court of appeals noted at the inception of this prolonged litigation, petitioner Independent U.S. Tankers Owners Committee "is composed of owners and operators of nonproprietary, unsubsidized tanker vessels, many of which are operating in the carriage of crude oil from Alaska to points in the U.S. [Petitioner's] members are, thus, directly affected by any new entrants to that trade." *Independent U.S. Tanker Owners Comm.* v. *Lewis*, 690 F.2d 908, 916 (D.C. Cir. 1982).

to participate in the domestic trade upon repayment of the unamortized amount of its CDS, plus interest compounded from the date of the payment of the subsidy. 50 Fed. Reg. 19,178 (1985).[4] That rule allowed repayment for only a one-year period, that is, through June 6, 1986, in order to minimize any uncertainty in the domestic fleet and shipbuilding industry. See *id.* at 19,173. During that period, only three VLCCs took advantage of the rule—the *Arco Independence*, the *Arco Spirit*, and the *Brooklyn*. Pet. App. 5a. The Secretary permitted those tankers to operate domestically after the owners repaid a total of $105.8 million in CDS and interest. See 52 Fed. Reg. 23,524 (1987).

b. Petitioners also challenged the Secretary's May 1985 rule. In *Independent U.S. Tankers Comm.* v. *Dole*, 809 F.2d 847, 851 (D.C. Cir.) (*ITOC II*), cert. denied, 484 U.S. 819 (1987), the court of appeals again vacated the rule, concluding that the Secretary had not provided a "sufficiently reasoned discussion of why [the] rule was adopted and alternatives were rejected in light of the purposes of the Merchant Marine Act." The court of appeals, however, stayed its mandate until July 16, 1987, both to avoid disruptions in the domestic trade and to give the Secretary the opportunity to "address the problems of the merchant marine trade." *Id.* at 855. Consequently, the three VLCCs affected by the May 1985 rule continued to operate in the domestic fleet.

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[4] The Secretary had issued his proposed rule in January 1983. See 48 Fed. Reg. 4408 (1983). Through successive appropriations riders, however, Congress prevented the Secretary from adopting that rule as final. See Pub. L. No. 98-78, § 315, 97 Stat. 472 (1983); Pub. L. No. 98-166, 97 Stat. 1077 (1983); Pub. L. No. 98-411, 98 Stat. 1551 (1984). The last rider, by its terms, expired on May 15, 1985.

c. In April 1987, the Secretary published a notice of rulemaking, proposing to reaffirm the allowance of CDS repayment and rescission of the domestic trading restriction only for the three tankers that MarAd had approved under the May 1985 rule—the *Arco Independence*, the *Arco Spirit*, and the *Brooklyn*—as well as the tanker that MarAd had approved under the prior October 1980 rule—the *Bay Ridge*. 52 Fed. Reg. 12,199, 12,202 (1987). In other words, the proposed rule applied only to those vessels that were already operating in the domestic trade on a full-time basis as a result of prior rules.

On June 22, 1987, the Secretary issued the final rule, which was accompanied by a comprehensive statement of its basis and purpose and an analysis of the comments received and alternatives considered. 52 Fed. Reg. 23,522 (1987). The Secretary made the rule effective immediately upon publication, invoking the "good cause" exception to the 30-day waiting period required by the Administrative Procedure Act, 5 U.S.C. 553(d). See 52 Fed. Reg. 23,536 (1987).

4. Meanwhile, Congress had begun work on a rider to an appropriations bill that was designed to bar CDS repayment arrangements. Pet. App. 6a. After promulgation of the Secretary's June 1987 final rule, Congress enacted Section 505 of the Supplemental Appropriations Act, 1987, Pub. L. No. 100-71, 101 Stat. 471. Section 505 expressly provides that no appropriated Merchant Marine Act funds

> shall be used * * * to propose, promulgate, or implement any rule or regulation, or, with regard to vessels which repaid subsidy pursuant to the [1985] rule * * * conduct any adjudicatory or other regulatory proceeding, execute or perform any contract, or participate in any judicial action with respect to the repayment of construc-

> tion differential subsidy for the permanent release of vessels from the restrictions in Section 506 of the Merchant Marine Act * * *.

Ibid. The President signed the Supplemental Appropriations Act on July 11, 1987. Pet. App. 6a.[5]

5. In June 1988, petitioners returned to the district court and challenged the Secretary's June 1987 rule on a number of grounds, including that the rule lacked an adequate statement of basis and purpose, conflicted with the purposes of the Merchant Marine Act, and violated Congress's prohibition on further subsidy repayments in Section 505 of the Supplemental Appropriations Act of 1987. Pet. App. 26a-27a.

On cross-motions for summary judgment, the district court vacated the Secretary's June 1987 rule and ordered that "any vessel operating in the domestic trade of the United States pursuant to [that] rule * * * be removed from that trade as soon as is practical." Pet. App. 48a. Turning to the legal effect of the appropriations rider, the court observed that "[r]ather than permit the agency the opportunity to reconcile the rule with the [Merchant Marine] Act, Congress moved decisively to end the rulemaking altogether." *Id.* at 28a. The court further noted that the "agency knew that Congress opposed CDS repayment and that it was in the process of legislating that opposition." *Ibid.* In these circumstances, the court determined, "[t]he agency's attempt to outrace Con-

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[5] In approving the legislation, the President stated that he "signed this bill into law based on the understanding that because this restriction on [the Secretary's] authority is not retroactive, it will have no effect on vessel owners who previously repaid their subsidies pursuant to a CDS repayment rule published in the *Federal Register* on June 22, 1987." President's Statement on Signing H.R. 1827 into Law, 23 Weekly Comp. Pres. Doc. 800 (July 11, 1987).

gress on this issue cannot be given effect." *Ibid.* The court therefore concluded that "Congress clearly intended to bar promulgation of any rule authorizing CDS repayment as of January 16, 1987 through enactment of Section 505 of the Supplemental Appropriations Act of 1987." *Id.* at 33a.

The district court also concluded that the Secretary's June 1987 rule was "arbitrary, capricious, an abuse of discretion or not otherwise in accordance with law." Pet. App. 35a. The court found that the Secretary had adopted the rule principally for economic reasons, *i.e.*, based on a determination that "the advantages of efficiency and transportation saving outweigh[ed] the net adverse impact on vessels and seam[e]n in the domestic trade." *Id.* at 36a. Those factors, however, are "not among the enumerated objectives of the Merchant Marine Act." *Id.* at 37a. The court found that "the evidence in the record strongly suggests that the challenged rule will not further directly many of the objectives of the Merchant Marine Act," *id.* at 39a, and concluded that the Secretary could not rely on "nonstatutory criteria at the expense of the objectives of the Merchant Marine Act," *id.* at 41a.[6]

6. The court of appeals reversed. Pet. App. 1a-21a.[7] The court of appeals concluded that the Secre-

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[6] The district court also concluded that the Secretary lacked "good cause" to waive the 30-day waiting period under 5 U.S.C. 553(d)(3). Pet. App. 42a-45a. The court of appeals did not reach that issue, holding that the Secretary, under 5 U.S.C. 553(d)(1), had authority to make the rule effective upon publication. Petitioners have not sought further review of that aspect of the court of appeals' judgment.

[7] The court of appeals had stayed the district court's order pending disposition of the appeal.

tary "has cured the shortcomings * * * identified in *ITOC II* and provided a sufficient statement of basis and purpose for the 1987 rule." *Id.* at 15a. The court accepted the Secretary's concession that "the rule will result in some reduction in employment," and reiterated that the Secretary "may not be able to pursue all of the [Merchant Marine] Act's goals simultaneously." *Ibid.* (citing *ITOC II*, 809 F.2d at 854 n.4). The court also found that "while others might interpret the evidence in different ways, the [Secretary's] conclusions have adequate support in the record." Pet. App. 15a. The court therefore held that the Secretary "acted neither arbitrarily nor capriciously, but in full accord with [his] legal responsibilities and the purposes of the [Merchant Marine] Act." *Id.* at 16a.

Turning to the effect of the appropriations rider, the court of appeals first dismissed the district court's suggestion that the June 1987 rule "must be set aside because MarAd had advance notice of congressional opposition to CDS repayments." Pet. App. 16a. The court observed that "it was by no means clear that the final version of the appropriations bill would contain section 505 because the Senate had already been persuaded to drop the section from its version of the Supplemental Appropriations Act." *Ibid.* And the court emphasized that "we know of no principle that holds that the executive branch must stay its hand whenever it learns that the legislative branch may change the law." *Ibid.*

The court of appeals next rejected the district court's conclusion that Section 505 barred the June 1987 rule, "find[ing] it difficult to reconcile the district court's interpretation with the plain language and stated purpose of [that provision]." Pet. App. 19a. The court concluded that Section 505's spending prohibition "is inherently prospective as the language

does not purport to reach expenditures already made." *Ibid.* The record showed that the Secretary's self-executing rule became final before Congress enacted Section 505 and required no additional expenditure of appropriated funds. As a result, the court concluded that Section 505 "neither retrospectively voids the 1987 rule nor prevents it from becoming fully operational." *Id.* at 21a.[8]

ARGUMENT

1. Petitioners renew their contention (Pet. 9-15) that Section 505 of the Supplemental Appropriations Act of 1987 prohibited the Secretary from applying the June 1987 maritime construction subsidy repayment rule to allow four oil tankers to participate in the domestic oil trade. The language of Section 505 forecloses that argument. By its terms, the statute provides that none of the appropriated funds "shall be used * * * to propose, promulgate, or implement any rule or regulation" with respect to the repayment of subsidies in order to permit CDS vessels to operate domestically. 101 Stat. 471. As the court of appeals correctly noted, Section 505 "operates exclusively as a restriction on the expenditure of appropriated funds. Such a prohibition is inherently prospective as the language does not purport to reach expenditures already made." Pet. App. 19a.[9]

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[8] One week after petitioners filed their petition for a writ of certiorari in this Court, petitioner Overseas Shipholding Group, Inc., on February 8, 1990, filed in the court of appeals a motion to recall and modify the mandate. That motion remains pending before that court.

[9] Petitioners' position is also inconsistent with the well-established principle that "congressional enactments * * * will

Moreover, the record shows, and petitioners do not seriously dispute, that the June 1987 rule was self-executing and became final before Congress enacted Section 505. That rule required no expenditure of appropriated funds—after July 11, 1987—in order to become effective. Thus, there was no expenditure of Merchant Marine Act funds to "conduct any adjudicatory or other regulatory proceeding, execute or perform any contract, or participate in any judicial action with respect to the repayment of construction differential subsidy" for the vessels covered by the 1987 rule. As the court of appeals found, "because payment from the three VLCCs has already been received and because the tankers have operated domestically since 1985, the rule affirms the right of [those tankers] to remain in domestic commerce, and their contracts need not be amended to confirm this right." Pet. App. 20a.[10] In other words, Section 505, by its terms, did not affect actions already taken by the Secretary on June 22, 1987—the effective date of the rule. For that reason alone, petitioners' attack

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not be construed to have retroactive effect unless their language requires this result." *Bowen* v. *Georgetown Univ. Hosp.*, 109 S. Ct. 468, 471 (1988). Nor can petitioners take refuge (Pet. 12 n.7) in *United States* v. *Sperry Corp.*, 110 S. Ct. 387, 396-397 (1989), since the law at issue there—Section 502 of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, 99 Stat. 438—unlike Section 505 of the Supplemental Appropriations Act of 1987, by its terms applied retroactively.

[10] Petitioners suggest in passing (Pet. 11-12 n.6) that the Secretary needed to take further action after June 22, 1987, in order to allow the tankers to operate domestically. The court of appeals, however, determined that the record contradicts that suggestion. See Pet. App. 20a.

(Pet. 12) on the "literalism" of the court of appeals is particularly inappropriate.[11]

2. Petitioners also contend (Pet. 15-20) that the June 1987 rule should be vacated because the Secretary did not consider a reasonable alternative to that subsidy repayment rule. Specifically, petitioners note that Sections 601(a) and 603(b) of the Merchant Marine Act, 46 U.S.C. 1171(a) and 1173(b), authorize the payment of operating subsidies to tankers to enable them to remain in the foreign trade, and contend that the Secretary should have considered granting such subsidies with respect to the four tankers at issue here. Petitioners, however, did not raise this issue in the court of appeals, and they have therefore not preserved it for review. *E.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, petitioners' claim rests on two mistaken premises. First, the record shows that the Secretary did consider, but ultimately rejected, the alter-

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[11] This is not a case where the pertinent legislative history shows that "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 310 (1989) (internal quotation marks omitted). The legislative history of Section 505 is at best inconclusive. See, *e.g.*, H.R. Conf. Rep. No. 195, 100th Cong., 1st Sess. 112 (1987); compare 133 Cong. Rec. E3170 (daily ed. July 30, 1987) (statement of Rep. Regula) (The House and Senate conferees intended that "[Section] 505 would be prospective in nature and would not in any way effect the legal viability of the final [June 1987] rule.") with 133 Cong. Rec. S9142 (daily ed. July 1, 1987) (statement of Sen. Hollings) (The conferees had specifically intended to thwart the Secretary's efforts to allow tankers that had already repaid their subsidies to operate domestically.).

native petitioners now propose. Full subsidy to the four tankers involved here would have cost the federal government "$5 million annually per ship"—an amount the Secretary determined to be "exorbitant" and incompatible with federal budgetary limitations. 52 Fed. Reg. 23,522, 23,528 (1987). The Secretary further found that, if he provided such subsidies, "[t]here would be no incentive for efficient operation and the Government would become the guarantor of profitable operation." *Ibid.* The Secretary determined that "the trade ramifications of such a massive open-ended subsidy could prove totally counterproductive at a time when the United States is seeking to remove other anticompetitive trade measures by our trading partners." *Ibid.*

Second, the pertinent provisions of the Merchant Marine Act, by their terms, do not require the Secretary to provide operating differential subsidies on demand. Section 603(a) of the Act, 46 U.S.C. 1173(a), provides that the Secretary "*may* enter into a contract with the applicant for the payment of an operating-differential subsidy determined in accordance with the provisions of subsection (b) of this section * * *" (emphasis added). And Section 601(a) of the Act, 46 U.S.C. 1171(a), makes plain that "[n]o such application [for a subsidy] shall be approved by the Secretary * * * unless he determines that," among other things, "the granting of the [subsidy] * * * is reasonably calculated to carry out effectively the purposes and policy of this chapter." Thus, there is no warrant for petitioners' suggestion (Pet. 18) that the provision for operating subsidies is mandatory.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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